IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4600 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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HARIVADAN MANEKLAL

Versus

BARODA MUNICIPAL CORPORATION

Appearance:

1. Special Civil Application No. 4600 of 1998

MR SP HASURKAR for Petitioner No. 1

MR PRANAV G DESAI for Respondents No. 1-2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 17/01/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Hasurkar for the petitioner and Mr. Pranav G. Desai, learned advocate for the respondent corporation. By way of this petition,

the petitioner has challenged the order passed by the Deputy Municipal Commissioner, Baroda Municipal Corporation dated April, 1996 wherein it has been decided that the petitioner is not entitled to pensionary benefits as he has not put in ten years' eligible service for the pensionary benefits. The petitioner has retired from service on 30th September, 1994. The petitioner had raised industrial dispute before the labour court, Baroda by filing reference no. 924 of 1986 challenging the order of termination of the respondent corporation. Before the labour court, the petitioner as well as the respondent corporation had arrived at settlement on 11th January, 1990 wherein it was agreed between the parties that the respondent corporation is agree to reinstate the petitioner to his original post as permanent supervisor and he will be reinstated after two weeks from the date of publication of the award and the petitioner has forgotten his right to claim back wages and continuity of service. It was also agreed by and between the parties that considering his daily rated and ad.hoc service for 720 days as per award, he will be made permanent in the respective grade. However, the petitioner has also agreed to the effect that in respect of his new appointment, his earlier service on ad.hoc basis will not be counted but for the purpose of gratuity, his service was considered to be continued with effect from 2nd August, 1982 and for that, the corporation was in agreement. Thereafter, the award was made by the labour court on 19th January, 1990. Pursuant to the said settlement arrived at between the parties and the award made by the labour court pursuant to such settlement, the petitioner was taken in service by the corporation by order dated 7th October, 1990 by considering 720 days of the petitioner which was considered to have been completed on 8th October, 1984 and, therefore, the petitioner was made permanent with effect from 9th October, 1984 in the pay scale of Rs.800-1150. Thereafter, the petitioner retired from service on 30th September, 1994. After retirement of the petitioner, the corporation passed an order granting pensionary benefits in favour of the petitioner by resolution No. 225/95-96 Annexure-G to the petition at page 43 but thereafter, said order was cancelled and it was decided that under the provisions of the Bombay Civil Service Rules, 1959 ["the BCSRs" for short], the petitioner is not entitled for pensionary benefits as he has not completed ten years' service.

2. In this petition, the respondent corporation has filed the affidavit in reply. In the reply, the respondent corporation has reiterated the same

thing that the petitioner is not entitled for pensionary benefits as his earlier service was not counted for other purpose except gratuity and therefore, the decision taken by the respondent corporation for not granting such benefit of pensionary benefit to the petitioner is legal and valid.

3. Learned advocate Mr. Hasurkar appearing for the petitioner has submitted that the petitioner has been made permanent with effect from 9th October, 1984 and retired on 30th September, 1994 and, therefore, there was shortfall of only eight days for becoming eligible for getting pensionary benefits. He has, therefore, submitted that as per Rule 192 of the BCSRs, the Corporation is having power to condone such deficiency. He has submitted that as per rule 192 of the BCSRs, the Corporation, for the special reasons to be recorded in writing, may condone the deficiency which may not ordinarily exceed one year, in the amount of duty or total service or both performed by a its servant in order to qualify him to receive retiring pension or to receive the amount of pension as distinct from a gratuity or to make an addition which may not ordinarily exceed one year, to the period of duty performed by a retiring government servant which under the provisions of these rules may be treated as a duty counting for pension. He has also submitted that under rule 9 sub clause 40 also, pension includes gratuity and, therefore, he has submitted that this Court (Coram : D.C. Srivastava,J.) has taken the view in similar matter by condoning one day's deficiency for completing ten years service in special civil application no. 10411 of 2000 decided on 17th February, 2001. He has submitted that this Court has considered the relevant provisions of rule 192 of the BCSRs in aforesaid decision. Therefore, he has submitted that it is the duty of the respondent corporation to exercise the powers as per rule 192 of the BCSRs in view of the peculiar facts of the present case by condoning the deficiency of only eight days for entitling the petitioner to receive his pensionary benefits and the respondents ought to have considered the case of the petitioner under rule 192 of the BCSRs for condoning the shortfall of eight days in ten years qualifying services.

On the other hand, learned advocate Mr. Desai appearing for the respondent corporation has submitted that Rule 192 of the BCSRs gives power to the corporation to condone such deficiency in service for granting pensionary benefits to the petitioner but for that, according to him, the petitioner has to approach the corporation. He has submitted as and when the petitioner

will approach the respondent corporation, the corporation will definitely consider the case of the petitioner while keeping in view the provisions of rule 192 of the BCSRs as well as rule 9 sub clause 40. He has also submitted that the case of the petitioner will be considered while keeping in view the principles laid down by this court in special civil application no. 10411 of 2000 dated 17th February, 2001 and will pass appropriate order within some reasonable period.

In view of these facts, in this petition, it is not in dispute that initially, the petitioner was appointed in the year 1982. It is also not in dispute that his services were terminated by the corporation in the year 1986 and such an action of termination of services was challenged by the petitioner before the labour court by raising industrial dispute and ultimately, the matter was settled between the parties as stated above. As stated above, it was agreed between the parties that the respondent corporation is agree to reinstate the petitioner to his original post as permanent supervisor and he will be reinstated after two weeks from the date of publication of the award and the petitioner has forgotten his right to claim back wages and continuity of service. It was also agreed by and between the parties that considering his daily rated and ad.hoc service for 720 days as per award, he will be made permanent in the respective grade. However, the petitioner has also agreed to the effect that in respect of his new appointment, his earlier service on ad.hoc basis will not be counted but for the purpose of gratuity, his service was considered to be continued with effect from 2nd August, 1982 and for that, the corporation was in agreement. Thereafter, the award was made by the labour court on 19th January, 1990. Pursuant to the said settlement arrived at between the parties and the award made by the labour court pursuant to such settlement, the petitioner was taken in service by the corporation by order dated 7th October, 1990 by considering 720 days of the petitioner which was considered to have been completed on 8th October, 1984 and, therefore, the petitioner was made permanent with effect from 9th October, 1984 in the pay scale of Rs.800-1150. Thereafter, the petitioner retired from service on 30th September, 1994. In view of these facts which are not in dispute, there is short fall of only eight days for the purpose of pension. In light of these facts, according to my opinion, the stand taken by the respondent corporation in not condoning only eight days in ten years qualifying service is not proper. As stated above, Rule 192 of the BCSRs gives power to the

respondent corporation to condone such shortfall. Therefore, considering these aspects of the matter and also looking to the definition under rule 9 sub clause 40 of the BCSRs, pension includes gratuity and there is no specific agreement between the parties that for pensionary benefits, his earlier service will not be counted, according to my view, all these aspects are required to be taken into account by the respondent corporation sympathetically as the petitioner has completed almost period except eight days considering his new appointment and service. Therefore, this case would require some sympathetic approach and consideration by the respondent corporation. Therefore, in the peculiar facts and circumstances of this case, according to my view, the respondents are required to be directed to consider the case of the petitioner in light of rule 192 and definition under rule 9 sub clause 40 of the BCSRs and also in light of the decision of this court in special civil application no. 10411 of 2000 dated 17th February, 2001.

Therefore, in the peculiar facts and circumstances of the case, it is directed to the petitioner to approach the respondent corporation with a request to condone the period of eight days for grant of pensionary benefits within fifteen days from the date of receipt of copy of this order. Petitioner is also directed to annex copy of this Court's decision dated 17th February, 2001 in special civil application no. 10411 of 2000 alongwith such representation that may be made by the petitioner pursuant to these directions. As and when such representation is received by the respondent corporation, it is directed to the respondent corporation to consider the case of the petitioner sympathetically and also to consider the case of the petitioner in light of the provisions under rule 192 of the BCSRs and rule 9/40 of the BCSRs as well as the decision of this Court dated 17th February, 2001 given in special civil application no. 10411 of 2000 and to pass appropriate orders with sympathetic approach within one month from the date of receipt of such representation from the petitioner and to communicate such decision to the petitioner. It is expected that the respondent corporation will consider the case of the petitioner sympathetically and would exercise the powers under rule 192 of the BCSRs and would also consider the principles laid down by this court as per the decision given in special civil application no. 10411 of 2000 dated 17th February, 2000. With these observations and directions, this petition is disposed of. Rule is made absolute in terms indicated hereinabove with no order as to costs.

17.1.2002. (H.K. Rathod,J.)

Vyas